STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

STEVEN J. VALCANIANT and
KATHLEEN A. VALCANIANT, his wife,

Plaintiffs-Appellants,

vs.

THE DETROIT EDISON COMPANY, a Michigan corporation, Jointly and Severally.

Defendant-Appellees.

Supreme Court No. 121141

Court of Appeals No. 227499

Case No. 98-025040-NI (H)

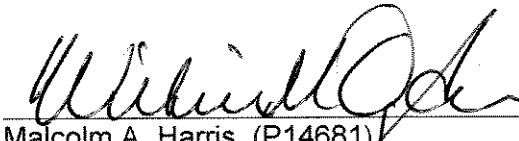
Malcolm A. Harris (P14681)
Michael J. Nolan (P42240)
William M. Ogden (P58692)
KOHL, HARRIS, NOLAN & McCARTHY, P.C.
Attorneys for Plaintiffs
3782 South Lapeer Road, Suite 200, PO Box 70
Metamora, MI 48455-0070
(810) 678-3645

Ronald C. Paradoski (P41426)
Kirsten L. DeGeer (P55508)
Attorney for Detroit Edison
243 W. Congress, Suite 1040
Detroit, MI 48226
(313) 963-1860

John P. Jacobs (P15400)
JOHN P. JACOBS, P.C.
Attorney of Counsel for Detroit Edison
One Town Square, Suite 1400
Southfield, MI 48076-3705
(248) 357-5380

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED



Malcolm A. Harris (P14681)
Michael J. Nolan (P42240)
William M. Ogden (P58692)
KOHL, HARRIS, NOLAN & McCARTHY, P.C.
Attorneys for Plaintiff/Appellant
3782 South Lapeer Road, Suite 200, PO Box 70
Metamora, MI 48455-0070
(810) 678-3645

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I. PLAINTIFF/APPELLANT'S STATEMENT IDENTIFYING THE JUDGMENT OR ORDER APPEALED FROM AND OPINION OF THE COURT OF APPEALS; STATEMENT OF BASIS OF JURISDICTION

The Court of Appeals opinion on this matter, (Valcaniant v The Detroit Edison Company, Court of Appeals Number 227499, (2002), unpublished) is approximately one page long. Given it's brevity, the entirety of this opinion is transcribed below (this can also be found at **APPENDIX 13**):

"Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

MEMORANDUM.

Defendant appeals by leave granted from the circuit court order denying its motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Steven Valcaniant was injured by a downed electrical line. He was directing a driver who was delivering a load of fill dirt. The driver backed the truck under an electric wire, of which both he and plaintiff were aware. When the truck bed rose, it came into contact with the wire, which fell into a puddle near plaintiff. Plaintiff received an electrical shock, causing burns to his arm and back. Defendant moved for summary disposition, asserting that it owed no duty to plaintiff because his injury was unforeseeable. The trial court found that it was foreseeable that the public would be injured by downed power lines, and thus defendant owed plaintiff a duty.

Those engaged in the transmission of electricity "are bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard the attendant risks. *Shultz v Consumers Power Co*, 443 Mich 445, 452; 506 NW2d 175 (1993). The test to determine whether a duty was owed is whether the utility should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure. Id.

There is no duty to warn someone of a risk of which that person is aware. *Groncki v Detroit Edison Co,* 453 Mich 664, 656; 557 NW2d 289 (1996). Specifically, there is no duty to warn of known overhead power lines. *Id. Groncki* involved three consolidated cases. In *Parcher v Detroit Edison,*

the plaintiff was injured while operating a forklift that came into contact with power lines at a construction site. *Id.* at 650. In *Groncki v Detroit Edison*, the plaintiff was a maintenance supervisor working on the roof of an apartment complex, when a ladder he was moving fell onto power lines. *Id.* at 651. In *Bohnert v Detroit Edison,* the plaintiff was delivering supplies to a construction site, and the boom he deployed from his truck came into contact with power lines. *Id. at 652-653.*

In *Parcher,* the Court found that summary disposition was properly granted to the defendant because it had no reason to know that any high profile machinery would be operated near its power lines. The events were unforeseeable and no duty arose. *Id.* at 657. In *Groncki,* the Court found that there was no duty where there were no defects in the lines and the plaintiff was an experienced workman who was fully aware of the dangers of electric lines. *Id.* at 658-659. In *Bohnert,* the Court found that it was not foreseeable that an experienced, skilled workman would disregard clear instructions and operate his delivery vehicle directly beneath the power lines. *Id.* at 659-660. The Court found that public policy of providing electric power at a reasonable cost militates against the imposition of a duty in these cases. *Id.* at 661-662. Applying the above principles, we conclude that defendant had no reason to foresee plaintiff's actions in this case. Because plaintiff's injury was not reasonable foreseeable, defendant owed plaintiff no duty to prevent it.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction."

MCR 7.301(A)(2) grants this Honorable Court the discretion to review a decision by the Court of Appeals. The Court of Appeals has rendered a final decision on this matter and Plaintiff/Appellant, per MCR 7.302, has filed his application for leave to appeal. Plaintiff/Appellant's application for leave was granted by this Honorable Court.

II. QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals commit clear error in holding that Groncki v Detroit Edison Co., 453 Mich 644, was applicable to the case at bar by ruling that Plaintiff/Appellant's injury was not reasonably foreseeable by declining to provide an analysis of whether Defendant/Appellee could have foreseen the likelihood of increased harm from the re-energizing of a downed power line?

The Trial Court would say: **"YES"**

The Court of Appeals said: **"NO"**

The Plaintiff/Appellant would say: **"YES"**

The Defendant/Appellee would say: **"NO"**

Did the Trial Court properly deny Defendant/Appellee's Motion for Rehearing based upon the Trial Court's denial of their Motion for Summary Disposition when it found the existence of a legal duty to protect against foreseeable injury from re-energized downed electrical lines, in ruling that Groncki v Detroit Edison, 453 Mich 644, 557 NW 2d 289 (1996), is distinguishable from the case at bar?

The Trial Court would say: **"YES"**

The Court of Appeals said: **"NO"**

The Plaintiff/Appellant would say: **"YES"**

The Defendant/Appellee would say: **"NO"**

III. INTRODUCTION

On August 15, 1995, Steven Valcaniant suffered a horrific experience. On that date, Mr. Valcaniant was electrocuted, and nearly killed, as a result of the massive voltage flowing through the Detroit Edison lines which had snapped and fallen to the ground on his property in Imlay City, Michigan. Mr. Valcaniant is lucky to be alive. He has, and will continue, to suffer from severe injuries and the physiological side effects of an electrocution injury.

In response to the claim brought against them, Detroit Edison chose to argue before the Trial Court that it owed no duty whatsoever to Steven Valcaniant under the guidance of Groncki v Detroit Edison Company, 453 Mich 644 (1996). As the Trial Court correctly ruled, Groncki is not the be all and end all of liability for an electrical utility company. The Groncki decision does not stand as judicially created immunity from liability for a utility company. Under the facts of Groncki, the Court found the utility owed no duty to warn of an uninsulated over-head power line, or to move, insulate, or de-energize power lines at a home construction site. The Groncki scenario was not what was at issue before the lower Court and is not what is at issue before this Court. Finally, and most importantly, Groncki is a non-binding plurality opinion, the resolution of which is of precedential value only to the parties involved.

In support of the Defendant/Appellee's perspective of what is at issue, they continue to insist that the crux of this case and the issue at bar is whether the specific facts of this case are foreseeable. The Plaintiff/Appellant's have not disputed, through the entirety of this action, whether the specific series of events that actually occurred

would be foreseeable and therefore impose a legal duty upon the Defendant/Appellee. This simply was not the issue that was pled and ruled upon by the Trial Court. On the contrary, consistent with the Trial Court's ruling, and the Plaintiff/Appellant's pleadings, this legal duty was created at the time the Defendant/Appellee, (Edison hereinafter), decided to re-charge the downed line after the breaker stopped the flow of electricity and heighten the Plaintiff/Appellant's injuries.

IV. STATEMENT OF FACTS

Plaintiff/Appellant, Steven Valcaniant, resides in Imlay City, Michigan, with his wife Kathleen and his three children. Mr. Valcaniant was, and is, the owner of Best-Buy Used Cars located at 7621 Imlay City Road, Imlay City, Michigan.

Located just off of M-53, a site of major road construction over the last few years, Mr. Valcaniant made arrangements with DeAngelis Landscape, Inc., a contractor involved in the M-53 road construction, to have excess dirt dumped at his place of business, the place where the accident eventually occurred. All of the above was true as of August 13, 1995, as well as August 14, 1995, the date that this incident occurred.

As part of Mr. Valcaniant's arrangement with DeAngelis Landscape, DeAngelis would remove excess dirt from the M-53 reconstruction project and deposit those loads on Mr. Valcaniant's property. On June 14, 1995, Mr. Valcaniant executed an agreement with DeAngelis that allowed DeAngelis to dump these excess earthen materials at the Best-Buy lot (**APPENDIX 4**, p. 61a, Ex. B, to plaintiff's brief below, dep of Steven Valcaniant, page 46). Between June 14 and August 14, Mr. Valcaniant estimated that approximately 100

loads of material had been delivered by DeAngelis (**APPENDIX 4**, p. 61a, p.47). On August 14, 1995, Mr. Valcaniant estimated that at least 5 to 10 loads of fill had been dumped in the southwest corner of his property prior to the actual accident at issue here. (**APPENDIX 4**, p. 60a, p. 58).

Mr. Valcaniant, on the fateful load in question, followed the truck to see where it was dumping on his property. As Mr. Valcaniant related in his deposition, the following pertinent details occurred in connection with the dumping of the fill dirt, which led to his electrocution:

> (a) Mr. Stander, the driver for DeAngelis Landscape, arrived on Mr. Valcaniant's property to dump a load of fill and "automatically started backing up to where we were dumping it". (**APPENDIX 4**, p. 60a, p.58, ln 14-15);
>
> (b) Mr. Valcaniant directed Mr. Stander to an area to dump the load so that Mr. Valcaniant could watch in order to keep Mr. Stander from backing into the guy wires, and also to insure that Mr. Stander did not back into any of Mr. Valcaniant's vehicles located on the premises (**APPENDIX 4**, p. 60a, p. 59, ln 3-12);
>
> (c) As Mr. Stander backed his vehicle under the guy wire, Mr. Valcaniant stopped his progress to prevent the truck from sinking into the mud (**APPENDIX 4**, p. 63a, p. 62, ln 2-5);
>
> (d) When Mr. Stander finally brought his vehicle to a rest, Mr. Valcaniant was standing six or seven feet to the north of the truck, parallel to the back of the truck cab (**APPENDIX 4**, p. 63a, p. 64, ln 3-13);
>
> (e) Mr. Valcaniant watched the dump box of the truck begin to rise and noticed "the thing was a little bit on an angle. And I've heard stories of them tall dump boxes flipping over if they are not level when you're dumping. So I decided to -- I'm going to get away from this. I turned around back to the truck and took one step and then the next thing I know, I heard a big bang and the electricity -- . . . it [the ground] wasn't quite 100% level. I didn't see a big problem with it, but I figure I'm going to get out of the way anyway just for safety." (**APPENDIX 4**, p. 63a, p. 65, ln 12-24);

(f) Mr. Valcaniant related having heard a "big bang like a firecracker going off," and then feeling "the most terrible pain you can imagine going through your body." (**APPENDIX 4**, p. 64a, p. 69, ln 1-10);

(g) Mr. Valcaniant also heard the truck engine rev, and again described this big bang and "the buzz of electricity was the things I heard", (**APPENDIX 4**, p. 64a, p. 69, ln 15-17);

(h) Mr. Valcaniant related having been frozen in one spot after he head this loud buzzing noise, but he did not fall to the ground immediately (**APPENDIX 4**, p. 65a, p. 70, ln 4-18);

(I) As Mr. Valcaniant described, the first wave of electricity "must have released me for a few seconds. And I fell to the ground lying on my back on a bunch of rocks in this big water puddle. And then the electricity hit me again. It burned my arm and my back. I had spots on my back where the rocks that were sticking up burned me." (**APPENDIX 4**, p. 65a, pp 70-71, ln 23-25, 1-3).

The most salient testimony of Mr. Charles Stander specifically states his recall of the events of that day. Rather than put words in the mouth of Mr. Stander, this Court is directed to pages 19a and 20a, (actual pages 11 and 12) of Mr. Stander's testimony for review in its entirety in **APPENDIX 2**.

There, particularly beginning at lines 22-25 of page 19a, (actual p. 11), and continuing through line 25 of page 20a, (actual p.12), Mr. Stander specifically recalled raising his truck box, but did not recall the box of his truck ever having struck near the overhead Edison lines. (**APPENDIX 2**, Exhibit D to plaintiff's brief below, Dep Trans of Charles Stander, p. 20a, p. 12, ln 14-17, 24-25). Conspicuous by its absence from Edison's recitation of the facts, is the exchange found at page 21a (actual p. 13) of Mr. Stander's deposition wherein Mr. Stander clarified what in fact he, the only witness to the actual dumping process, noted on August 14, 1995. At page 21a, (actual p. 13), beginning

at line 6, Mr. Stander testified:

> When the load came loose, the trailer lifted up. I had my head turned because I stopped the box. I was looking out the back window when the box was going up. I stopped it. I turned my head. The load came loose. **The trailer lifted up a little bit and I heard an arc or electricity hitting the trailer.**" Page 21a, p. 13, lines 6-11, (emphasis added, **APPENDIX 2**).

As a result of Mr. Valcaniant's electrocution, he was admitted to the Lapeer Regional Hospital and treated for various injuries and conditions related to his electrocution. (**APPENDIX 1** , Exhibit 3 to plaintiff's brief below, medical records). For this, there is no dispute.

On January 14, 2000, Defendant/Appellee, the Detroit Edison Company, filed a Motion for Summary Disposition based on a lack of duty. (**APPENDIX 6**). Following the Motion hearing on March 6, 2000 (**APPENDIX 7**), the Trial Court entered an Order Denying Defendant's Motion for Summary Disposition on March 17, 2000. (**APPENDIX 8**). Defendant/Appellee timely filed their Motion for Rehearing with respect to the same on March 30, 2000. (**APPENDIX 9**). The Trial Court issued a written decision (**APPENDIX 10**) and then entered an Order Denying Defendant/Appellee's Motion for Rehearing of the Court's denial of Defendant's Motion for Summary Disposition on May 8, 2000. (**APPENDIX 11**).

Defendant/Appellee timely filed its Application for Leave to File Interlocutory Appeal with the Michigan Court of Appeals on May 26, 2000. The Michigan Court of Appeals granted the Application pursuant to an Order dated September 11, 2000. (**APPENDIX 12**). Both parties then subsequently filed their respective Briefs in Support. The Michigan Court of Appeals issued its unpublished memorandum opinion on February 19, 2002 reversing

the Trial Court and remanding this matter for further proceedings consistent with their opinion. (**APPENDIX 13**).

Application for Leave to Appeal and Brief in Support was filed by the Plaintiff/Appellant with this Court within 21 days after issuance of the Michigan Court of Appeals unpublished opinion which ordered the reversal and remand of the Trial Court's findings. This Honorable Court has Jurisdiction to hear and decide this Appeal pursuant to MCR 7.301 (A)(2), MCR 7.302 (C)(2)(a), for the grounds provided in MCR 7.302 (B)(3) and MCR 7.302 (B)(5).

V. PLAINTIFF/APPELLANT'S ARGUMENT FOR PEREMPTORY REVERSAL AND REQUEST FOR REMAND REGARDING THE COURT OF APPEALS DECISION RENDERED FEBRUARY 19, 2002

THE COURT OF APPEALS COMMITTED CLEAR ERROR IN HOLDING THAT Groncki v Detroit Edison Co., 453 Mich 644, WAS APPLICABLE TO THE CASE AT BAR BY RULING THAT PLAINTIFF/APPELLANT'S INJURY WAS NOT REASONABLY FORESEEABLE BY DECLINING TO PROVIDE AN ANALYSIS OF WHETHER DEFENDANT/APPELLEE COULD HAVE FORESEEN THE LIKELIHOOD OF INCREASED HARM FROM THE RE-ENERGIZING OF A DOWNED POWER LINE.

ARGUMENT

The Michigan Court of Appeals committed clear error in the rendering of it's unpublished opinion on February 19, 2002 in the matter at hand. Quite simply, the Court of Appeals completely missed the issue and decided the matter on the basis of whether the Plaintiff/Appellant was electrocuted. The actual issue, as further revealed below, is whether the Defendant/Appellee owed the Plaintiff/Appellant any duty of care to prevent the foreseeable harm caused by the re-energizing of an already downed electrical line.

This is a subtle distinction but a clear distinction none the less. THE ISSUE IS **NOT** whether it was foreseeable, and therefore a corresponding duty was owed, when a downed power line electrocutes an individual in the vicinity. The Plaintiff/Appellant, from the time of the original Motion for Summary Disposition at trial, through the appeal that was taken, **AT NO TIME** disputed that no duty was owed for the initial downing of the power line.

What was pled and argued at the Motion for Summary Disposition (and subsequent Motion for Rehearing), and ruled upon the Trial Court Judge was that the **RE-ENERGIZING** of the circuit which resulted in the **RE-ELECTROCUTION** of the

Plaintiff/Appellant was a foreseeable event to the Defendant/Appellee which created a duty upon Detroit Edison to prevent such aggravated harm to a potential electrocution victim.

A. DEFENDANT/APPELLEE'S MOTION FOR SUMMARY DISPOSITION

The entire transcript of the oral argument on this Motion for Summary Disposition and the Trial Court's findings can be found attached at **APPENDIX 7**. Relevant parts are provided herein.

The Defendant/Appellee did a wonderful job in it's thorough recitation of the status of utility liability in Michigan jurisprudence. However, Plaintiff/Appellant's counsel clearly laid out what the issue is at oral argument. Mr. Michael Nolan stated:

> "So a lot of things that aren't in issue anymore (referring to Defendant/Appellee's red herrings), she (Defendant/Appellee's counsel) was right in her recitation of that. But simply, all we're here for is whether or not there was a duty, and under the analysis of the case law that we've cited under the facts in this particular case, we believe the duty does exist for a public utility company to take steps to protect people from downed power lines, and simply all they had to do was see what the problem was **before they turned the power back on.**
>
> Mr. Valcaniant, as the jury will hear should we get that far, **was injured from the second jolt (of electricity), and it was when Edison flipped the power back on, whether they had a person there with their hand on the switch or not doesn't matter, they had machinery in place to do it for them.** That's what caused the problem. That's what makes this case different from all those cited by counsel, and that's what we think imposes a foreseeable duty on Edison." (Emphasis added).

APPENDIX 7, p. 134a, lines 4 - 22.

The Trial Court, Judge Nick O. Holowka presiding, in ruling on Defendant's Motion for Summary Disposition stated what the issue before the court was and his decision :

"The (Plaintiff/Appellant's) expert further descries how the Plaintiff suffered four separate electrical shocks. This, he alleges, was due to the failure to (sic) Detroit Edison to install certain safety devices."

APPENDIX 7, at p. 129a, p. 19, lines 5 - 8.

Further,

"The Defendant cites Groncki versus Detroit Edison and numerous other cases for the proposition that when a Plaintiff is unforeseeable, a power company owes no duty to either insulate, move or de-energize its power lines. It further argues that because Plaintiff knew of the power line's existence, it had no duty to warn him about them.

The Plaintiff does not contest these allegations. Instead, he argues that the issue in this case is . . . (w)hether the Defendant's had a duty to protect innocent bystanders from the harm caused by a downed re-energized power line.

The Plaintiff's theory of the case is that the majority of his injuries were caused by Detroit Edison's failure to properly install a fuse cut-out in the power line.

He argues that this device in conjunction with what is known as a circuit reclosure would have prevented the circuit reclosure from automatically re-establishing current through the downed line.

The Plaintiff claims that as a result of the circuit being reclosed he suffered three more electrical shocks in addition to the first one." (Emphasis added).

APPENDIX 7, at p. 129a, p. 19, lines 11 - 25; p. 130a, p. 20 lines 1 - 16.

The Trial Court distinguished Groncki by stating:

"In the instant case, the Plaintiff claims that he was merely a bystander to the operation of the dump truck. Thus, unlike Groncki case, he was not the person operating the mechanism which struck the power lines.

Also, unlike Groncki he was neither a skilled nor experienced workman because, thus, experience falls outside the scope of that decision."

APPENDIX 7, at p. 143a, p. 23, lines 12 - 19.

In it's holding, the Trial Court stated:

"In the instant case, the conduct of which the Plaintiff complains of or the risk which Detroit Edison has taken is that when the circuit in one of its

power lines becomes broken that circuit will re-energize four times before it is entirely shut off.

The Court's understanding is that the purpose of the re-energizing a shorted power line is to allow the line to burn through trees or other minor impediments. Thus, in taking this expedient, the question becomes whether Detroit Edison could have reasonably perceived that a person who comes into contact with a downed wire would suffer increased harm from the line's re-energization.

In this Court's mind the answer to that question is most assuredly yes."

APPENDIX 7, at p. 144a, p. 24, lines 5 - 20.

This is the decision that the Defendant/Appellee originally appealed from and it can clearly be seen that the Court of Appeals missed the mark entirely. The proper review should have incorporated an analysis of whether Detroit Edison could have foreseen the likelihood of increased harm from the re-energizing of a downed power line.

B. DEFENDANT/APPELLEE'S MOTION FOR REHEARING

Additionally, the Trial Court again went on the record in Defendant/Appellee's Motion for Rehearing of the Trial Court's denial of their Motion for Summary Disposition to reveal what the actual issue is for the case at bar. The Trial Court, in denying the Defendant/Appellee's prayer for relief, went on to initially state:

"The grant or denial of a motion for reconsideration is within the sound discretion of the court. And a motion which merely presents the same issues ruled on previously will not be granted.

In this case each of the dispositive issues which have been raised by the Defendant were addressed by the Court in its earlier opinion. Therefore, this motion for reconsideration is considered and denied.

However, the Court will take this opportunity to address Defendant's further arguments on the issues of Defendant's duty to CLARIFY THE RECORD." (Emphasis added).

Trial Court written findings on Defendant/Appellee's Motion for Rehearing, **APPENDIX 10**, p. 175a, p. 5, lines 16 - 25; p. 176a, p. 6, lines 1 - 3.

The Trial Court reaffirmed what was at issue in this case by stating:

> "In the instant case **the harm which Plaintiff complains of and the risk the Defendant undertook was that when one of its power lines comes down, the line will be re-energized four times before being completely shut off.**
>
> **In taking this risk, the Defendant could have reasonably perceived the Plaintiff in the same proximity as the downed wire would suffer increased harm because of its re-energization.**
>
> **Thus, THE ISSUE IN THIS CASE IS NOT AS . . . THE DEFENDANT CHARACTERIZES WHETHER EDISON HAD ANY REASON TO FORESEE THAT THIS PARTICULAR POWER LINE WOULD CAUSE PLAINTIFF HARM. INSTEAD, IT IS WHETHER THE DEFENDANT COULD HAVE FORESEEN FOR WHATEVER REASON THAT LINES COME DOWN IN THE FIRST PLACE."** (Emphasis added).

APPENDIX 10, at p. 177a, p. 7, lines 12 - 25, p. 178a, p. 8, lines 1 - 2.

C. DEFENDANT/APPELLEE'S BRIEF IN THE COURT OF APPEALS

This Honorable Court need not go any further than to the "STATEMENT OF QUESTION PRESENTED" in Defendant/Appellee's Brief in Support to the Court of Appeals to discover the palpable error committed in the unpublished opinion of the Court of Appeals.

That "STATEMENT OF QUESTION PRESENTED" states:

> **"I. DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S MOTION FOR REHEARING/MOTION FOR SUMMARY DISPOSITION BASED ON LACK OF DUTY, WHEN IT FAILED TO FOLLOW THE MICHIGAN SUPREME COURT'S MAJORITY OPINION IN GRONCKI v THE DETROIT EDISON COMPANY, 453 Mich 644, 557 NW2d 289 (1996), (WHICH HOLDS THAT AN ELECTRIC UTILITY HAS NO DUTY TO DE-ENERGIZE OVERHEAD LINES ABSENT A**

FORESEEABLE INJURY), BECAUSE THE TRIAL COURT AGREED WITH JUSTICE LEVIN'S DISSENTING OPINION IN THAT CASE."

Id, at p. iv.

Even the Defendant/Appellee's themselves instructed the Court of Appeals to consider the secondary event of re-energizing their power lines.

However note, and it is argued *infra*, that Groncki is NOT a majority opinion, rather a plurality opinion, which does not afford Groncki the level of *stare decisis*. This in turn allowed the Trial Court to properly follow Justice Levin's dissenting opinion in Groncki, and other opinions that the Trial Judge subsequently relied upon.

Regardless, Groncki cannot be interpreted as the Defendant/Appellee represents that it does. The actual injury does not have to be foreseeable. If this were the case, utility companies would be absolutely shielded from all liability because any one specific injury can be easily argued as unforeseeable. The proper statement of the law produced by Groncki (and applicable only to Groncki and the cases consolidated therein because of its plurality nature) is whether the accident (a downed power line) is foreseeable. Detroit Edison can not be heard to say that it is unforeseeable that people will not be re-electrocuted when they themselves consciously and repeatedly re-energized a downed line without concern to what or whom is at the receiving end.

Nonetheless, even the Defendant/Appellee themselves correctly identified the unique circumstances of the case at bar. Despite their ruling, the Court of Appeals somehow ignored the correct issue for review as presented by the Plaintiff/Appellant **AND** the Defendant/Appellee.

D. CONCLUSION

What the issue really is, and what the Court of Appeals clearly missed, is Plaintiff/Appellant's injuries are aggravated harm caused by the re-energization of a downed power line which came into contact with a member of the general public.

In the alternative of a peremptory reversal and remand to the Court of Appeals, the Plaintiff/Appellant's secondary prayer for relief is to have this Honorable Court decide the matter on the merits.

The Court of Appeals in it's unpublished memorandum opinion clearly missed the issue. For whatever reason, their analysis is premised upon an assumption that this is just a simple electrocution case with a sophisticated Plaintiff. That is NOT the issue and the Court of Appeals clearly did not review the Plaintiff/Appellant's brief in it's determination and decision on these matters.

For these clear reasons, the Plaintiff/Appellant prays that this Honorable Court peremptorily reverse the Court of Appeals opinion and remand this case to their jurisdiction for an actual, complete and thorough review on the correct issue, that being: The Trial Court's denial of the Defendant/Appellee's Motion for Rehearing on denial of Defendant's Motion for Summary Disposition on the basis that Detroit Edison could have reasonably perceived that a person who comes into contact with a downed wire would suffer increased harm from that line's re-energization.

VI. PLAINTIFF/APPELLANT'S ARGUMENT ON THE MERITS

THE TRIAL COURT PROPERLY DENIED DEFENDANT/APPELLEE'S MOTION FOR REHEARING BASED UPON THE TRIAL COURT'S DENIAL OF THEIR MOTION FOR SUMMARY DISPOSITION WHEN IT FOUND THE EXISTENCE OF A LEGAL DUTY TO PROTECT AGAINST FORESEEABLE INJURY FROM RE-ENERGIZED DOWNED ELECTRICAL LINES, IN RULING THAT Groncki v Detroit Edison, 453 Mich 644, 557 NW 2d 289 (1996), IS DISTINGUISHABLE FROM THE CASE AT BAR.

ARGUMENT

A. STANDARD OF REVIEW

Edison has flatly asserted that under the Groncki, Parcher and Bohnert decisions, Edison wins because it owed no duty to Mr. Valcaniant whatsoever. This proposition, although basic, is simply not supported by a careful analysis of Michigan law, nor under Groncki, when considered in light of the facts of its cases. An in-depth analysis of the law reveals that Edison's position cannot be sustained and the Court of Appeals decision regarding their theories must be reversed.

1. MCR 2.116(C)(10)

One basis for Edison's Motion for Summary Disposition was premised upon application of MCR 2.116(C)(10), which was denied by the Trial Court. It appears that a "(C)(10)" analysis was utilized by the Court of Appeals in its opinion regarding foreseeability.[1] That portion of the summary disposition rule provides that it is a sufficient ground for summary disposition if "except as to the amount of damages, there

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[1] The other basis was MCR 2.116(C)(8); which is not addressed in this Brief given the Court of Appeals opinion and analysis.

is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law". This Court in Smith v Globe Life Insurance Company, 460 Mich 446 (1999), set forth the applicable standard for reviewing motions for summary disposition brought pursuant to MCR 2.116(C)(10). There, the Smith court stated at page 454:

> "In reviewing a motion for summary disposition brought under MCR 2.116(C)((10), a trial court considers affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5) in a light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10),(G)(4). In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher* v *Globe Furniture Rentals*, 205 Mich App 418, 420, 522 NW 2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a non-moving party, the non-moving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth the specific facts showing that a genuine issue of material fact exists. *McCart* v *J. Walter Thompson*, 437 Mich 109, 115, 469 NW 2d 284 (1991)."

Applying the above standard, the issue of whether or not a duty was breached is a genuine issue of material fact which must be decided by the trier of fact.

B. LEGAL ANALYSIS

1. GRONCKI v. THE DETROIT EDISON COMPANY - CASE REVIEW

The Defendant/Appellee's primary reliance upon Groncki v. The Detroit Edison Company, 453 Mich 644; 557 NW2d 289 (1996), for justifying relief is misplaced. Firmly established principles of law prevent Groncki from being considered as binding

authority for the purposes of resolving the issue at bar. Secondarily, (and argued in the alternative), the Groncki decision consolidated and resolved three actions against Edison.[2] These three separate cases, although factually similar, were independently reviewed and analyzed. Even to a layperson, their isolation and distinct treatment is obvious and should be noted. Further, lacking within this opinion is the express pronouncement that Groncki is to be the standard to be followed in determining whether a duty exists upon The Detroit Edison Company or a utility provider. The most simple and apparent understanding of the Groncki decision is that only the parties to these respective results were bound by its judgment.

2. A PLURALITY DECISION IS NOT *STARE DECISIS*

Michigan jurisprudence has long followed the proposition that plurality decisions are not precedential and are limited to their facts. In People v. Armstrong, 207 Mich App 211; 523 NW2d 878, (1994), the trial court's basis for suppressing the Defendant's statements was appealed. The primary issue on appeal was whether the trial court's reliance upon People v. Wright, 441 Mich 140; 490 NW2d 351 (1992), was proper.

Armstrong, holding that Wright was improperly utilized, stated:

> "**To create binding precedent, a majority must agree on a ground for decision. If a majority merely agrees with a particular result, then the parties are bound by the judgment, but the case provides no binding**

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[2] Within Groncki, three separate cases were consolidated for review: Groncki v. The Detroit Edison Company; Bohnert v. The Detroit Edison Company; and Parcher v. The Detroit Edison Company. Additionally, this Court also consolidated and decided Bohnert v. Carrington Homes within Groncki (alleging that the homebuilder was also liable for the electrocution death of the Plaintiff's husband). Generally, Carrington Homes is inapplicable for the case at bar. However, its inexplicable presence will be addressed and questioned later in this brief.

authority beyond the immediate parties. See *People* v. *Petros*, 198 Mich. App. 401, 407, 499 N.W.2d 784 (1993). In Wright, though Chief Justice Cavanagh deemed the reasoning and conclusion of Justices Mallett and Levin as "supportable," he concurred in result only in a separate opinion. Chief Justice Cavanagh was joined by Justice Brickley. Justices Boyle, Griffin, and Riley dissented. Thus, five of the seven Justices did not endorse the principle embraced by Justices Mallett and Levin that, in effect, would create an exception per se to the traditional "totality of the circumstances" analysis. (Emphasis added). Id, at _____."

207 Mich App 211, 214 - 215.

Further, in People v. Stevens, 461 Mich 655, 664, n.7; 610 NW2d 881, (2000), this Court provided clear support for the proposition that the Groncki rational cannot be considered to determine open legal issues. The Stevens Court held:

" 'The clear rule in Michigan is that a majority of the Court must agree on a ground for decision in order to make that [decision] binding precedent for future cases. If there is merely a majority for a particular result, then the parties to the case are bound by the judgment but the case is not authority beyond the immediate parities.' [*People* v. *Sexton*, 458 Mich. 43, 65, 580 N.W.2d 404 (1988), quoting *People* v. *Anderson*, 389 Mich. 155, 170, 205 N.W.2d 461 (1973).]
Accordingly, our decision is not contrary to prior Michigan law as indicated by the dissent [In *Stevens*,] because *Jones* simply did not establish any law (beyond resolving its own case)."

3. GRONCKI, A PLURALITY DECISION IS NOT *STARE DECISIS* AND IS OF NO AUTHORITY BEYOND ITS IMMEDIATE PARTIES

Either one of two conclusions must be made regarding Groncki: One, that no true majority rationale exists and Edison's reliance upon its presumed precedent is suspect. Or two, if it could be viewed that a majority of sitting Justices agreed upon a particular result, Groncki would only be binding upon the parties in the respective cases reviewed therein. Groncki's judicial stances are represented in **APPENDIX 14**.

Examining the concurring Justices positions in Groncki, Justice Brickley led this plurality by authoring the review of the consolidated claims. Justice Brickley states that "[e]ach of the cases against Detroit Edison was decided on summary disposition regarding the issue of duty." 453 Mich 644 at 644.

Justices Riley and Weaver chose to "join part II of the opinion, which concludes that the trial court properly granted summary disposition in favor of defendant Detroit Edison in all three cases." Id at 675. Their dissent from Justice Brickley's lead opinion concerned part III of the review. Part III dealt with general contractor liability with respect to the Bohnert v. Carrington Homes Inc. case and is inapplicable to the direct analysis at hand (nonetheless supporting the theory of a plurality). Justice Riley never affirmatively stated agreement with Justice Brickley's rationale authored in part II of the Groncki decision.[3]

Next is the review of Justice Mallett's opinion (as joined by Justice Cavanagh). This is where pertinent deviation occurs and the reservoir of doubt is rapidly growing. Justice Mallett states:

> "I concur with the lead opinion's holding in both *Parcher* v. *Detroit Edison* and *Bohnert* v. *Detroit Edison*. However, I disagree with the lead opinion's conclusion that Detroit Edison is not liable for the injuries in *Groncki* because it was not foreseeable that this plaintiff would come into harmful contact with the overhead power lines."

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[3] Justice Riley states: "I agree with the lead opinion that defendant Detroit Edison did not have a duty as a matter of law to any of the three plaintiffs because it could not have reasonably foreseen that someone would be injured in the particular circumstances of each case." 453 Mich 644, at 674. Justice Riley never commits to agreeing with the **rationale** of the lead opinion. Either way, it is strongly argued that this language reflects the independent nature of the four cases.

Id, at 665.

Now there are three Justices, Justice Mallet as joined by Justice Cavanagh, and Justice Levin in his dissent, who disagree with the rationale of the lead opinion.

Last is Justice Boyle's position in Groncki. Innocuous and benign, only one sentence exists within all of Groncki reflecting Justice Boyle's sentiments on the matter:

"BOLYE, J., **concurred only in the result**." (Emphasis added) Id, at 665.

Properly applying and executing the rule of *stare decisis*, this sentence is the death knell of Edison's foundation for relief. Given the above, **APPENDIX 14** demonstrates that only three Justices completely agreed on the grounds for decision regarding Edison's conduct as provided in Groncki.

As stated in Armstrong, *supra*, (and later confirmed by this Court in Stevens *supra*, by a 5-2 vote), construing Wright, *supra*, "if a majority merely agrees with a particular result, then the parties are bound by the judgment, but the case provides no binding authority beyond the immediate parties." 207 Mich App 211, at 215. A majority Justices merely "agree with the particular result" in Groncki. Justice Boyle has conclusively stated that she agrees in the result only. Therefore, Groncki provides no binding authority beyond the immediate parties in its case.

The foundation upon which Edison has built and rested its defense is of no precedential value to the issue at bar. Edison clearly relies upon Groncki as its cornerstone for relief as did the Court of Appeals. The Trial Court was simply not required to follow Groncki. No majority existed and no precedent was set outside of the parties involved in the Groncki cases.

4. GRONCKI LIMITS ITS APPLICATION TO ITS FACTS

Mr. Valcaniant alternatively argues that Groncki is limited to its facts only. Throughout Groncki, evidence of this sentiment is overwhelming.

Nowhere in Groncki does Justice Brickley state or even hint that the consolidation and resolution of these three cases overrules Schultz v. Consumers Power Company, 443 Mich 85; 506 NW2d 175, (1993), and creates a new standard in applying a duty analysis to an electrical utility supplier.[4]

If anything, the correct inference to be drawn is that it was intended by Justice Brickley that his opinion be binding only upon the parties involved. He takes great measure to detail, format and to section off the facts and analyses of each case. He independently reviews each situation by compartmentally stating and applying the law.

Nowhere does Justice Brickley provide a conclusion that lays out the framework of a legal analysis that would be applicable to the cases within, and the cases to follow Groncki. In reading the CONCLUSION section itself, Justice Brickley only reiterates what actions are to be taken for each respective case. 453 Mich 644, at 665.

C. DUTY ESTABLISHED

It is Hornbook law that the four elements of a negligence cause of action are: (1) the existence of a legal duty; (2) the breach of such duty; (3) a proximate causal relationship between the breach of such duty and an injury to the plaintiff; and (4) the plaintiff must have suffered damages. Stephens v Dixon, 449 Mich 531; 536 NW2d 28,

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[4] Four cases including Bohnert v. Carrington Homes, Inc.

(1995); Schultz v Consumers Power Company, 443 Mich 445; 506 NW2d 175, (1993); Riddle v McLouth Steel, 440 Mich 85; 485 NW2d 676, (1992).

Of the four elements of the negligence cause of action pled here, Edison attacks only the first element of Plaintiff's case, that of the existence of a legal duty. This threshold issue of whether a duty exists in any given case is to be decided by the trial court as a matter of law. In other words, it is for the trial court to decide what circumstances must exist in order for Defendant's duty to arise. Riddle *supra.*

In general, as recognized by this Court in both Groncki, *supra*, at 654, and Schultz, *supra*, at 452, "Utility companies, particularly electric companies, are charged with a duty to protect against foreseeable harm."

1. THE DUTY OF SUPPLIERS OF ELECTRICITY

Does an electrical company owe a duty to those whom it supplies electricity to safeguard generally for the safety of the consuming public? The answer is without doubt, yes. This question was answered unequivocally by this Court in Schultz v Consumers Power Company, 443 Mich 445 (1993). There, this Court limited its decision to the single argument of Defendant Consumers Power -- whether Consumers owed a legal duty to Plaintiff. Noting that the duty element of a negligence action requires examination of a wide variety of factors, "including the relationship of the parties and the foreseeability and nature of the risk", the Schultz court found no difficulty in imposing a legal duty on Consumers Power. Id, at 450. The Schultz court held:

> "... compelling reasons mandate that a company that maintains and employs energized power lines must exercise reasonable care to reduce potential hazards as far as practicable. First, electrical energy possesses inherently dangerous properties. Second, electric utility companies possess expertise in dealing with electrical phenomena and delivering electricity. Lastly, although a reasonable person can be charged with the knowledge of certain fundamental facts and laws of nature that are part of the universal human experience, such as the dangerous properties of electricity, it is well settled that electricity possesses inherently dangerous properties requiring expertise in dealing with phenomena. Therefore, pursuant to its duty, a power company has an obligation to reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects." [citations omitted].

Id, at 451.

Directly analyzing the same argument put forth by Detroit Edison here, the Schultz Court wisely wrote:

> "Those engaged in transmitting electricity are bound to anticipate ordinary use of the area surrounding the lines and to appropriately safeguard the attendant risks. **The test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure.**" (emphasis added).

Id, at 452

This duty, the protestations of Edison to the contrary notwithstanding, was adopted and reaffirmed by the Groncki plurality. *See* Groncki, 453 Mich 644 at 654-656. Edison has argued that Groncki limited Schultz to its facts and somehow changed the duty owed to end-users of electricity. As noted above, this contention is not supported in the plurality of the Groncki decision itself, or in opinions post-Groncki.

The Groncki decision is not the sweeping legal pronouncement claimed by Edison. Justice Mallett, joined by Justice Cavanagh, concurred in part and dissented in

part and specifically complained the lead opinion "gives far too narrow a reading to our holding in *Schultz* v *Consumer Power Company*" , Groncki, 453 Mich 644 at p. 666. Further, Justice Levin filed a dissent in which he blasted the lead opinion for its finding of no duty, and wrote "the Court's obligation is to hold that Detroit Edison, like every other seller of potentially dangerous products, had the duty to take reasonable -- not ruinous -- precautions to protect the public from known, and thus foreseeable risks of harm." Id., at 683 - 684.

Despite Edison's assertion that Groncki is the be all and end all of utility liability, the Michigan Court of Appeals has viewed that decision differently since the date of its release in 1996. For example, in Carpenter v Consumers Power Company, 230 Mich App 547 (1998), *appeal denied*, 595 NW 2d 855 (1999), *appeal granted* in Case v Consumers Power Company, 603 NW 2d 779 (1999), the Court of Appeals adopted and applied the Schultz standard for determining legal duty and found such a duty existed and was owed to a farmer in a "stray voltage" case. The Carpenter court held that although the risks posed by stray voltage were not as great as those posed by live power lines, "electricity nevertheless does require expertise in dealing with its phenomena. If the damage is reasonably foreseeable, then a duty is owed." (Citing Schultz) 230 Mich App 547, 559.

On appeal, the Carpenter Appellate Court's decision was reviewed in Case. There, this Court overturned the Appellate Court's holding noting that the Carpenter jury instructions were improper and they did not correctly follow the rule of law set forth

in Schultz. The cases were then remanded to the Trial Court for a new trial. Case v. Consumers Power Company, 463 Mich 1, 3; 615 NW2d 17 (2000).

The Case decision takes careful measure to instruct its reader that it concerns management, effect and liability regarding stray voltage only. The Case Court goes on to explicitly state:

> "... it [is] beyond dispute that the dangers of high-voltage electricity (fire, electrocution, and death among them) are different in kind, and more severe, than the dangers of stray voltage. Schultz represents a very limited exception to the general rule that the jury determines the specific standard of care owed by a defendant in a particular case, and stray voltage simply does not qualify for that unusual treatment. Thus, we conclude that the obligation to inspect and repair that was articulated in Schultz is inapplicable in stray-voltage cases."

Id, at 9.

Given the recent consideration and review of Case, it is quite apparent that nothing set forth within Schultz was overturned. Actually, Case provided further support for the exact principles that Plaintiff/Appellant's provide to this Court for review:

> "This Court recognized that "electricity possesses inherently dangerous properties" and that "electric utility companies possess expertise in dealing with electrical phenomena and delivering electricity." *Schultz* at 451, 506 N.W.2d 175 . . . not only [do] electric utility companies [owe] a duty to exercise reasonable care in maintaining their wires, but that [these] companies are required to 'reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects. *Id.* at 451, 506 N.W.2d 175."

Id, at 7,8.

Case clearly affirmed what Mr. Valcaniant has claimed all along: electrical companies owe a "duty to exercise reasonable care in maintaining their wires." Id, at 7. Defendant/Appellee Detroit Edison is not following a standard of reasonable care by

recklessly and negligently implementing a policy that requires the re-electrification of a powerless line 4 times without knowledge of who or what would suffer its deadly effects.

The Carpenter court, and its lineage, did not even once cite to Groncki, and found an affirmative duty exists as to electrical utilities.

Again, in Girvan v Fuelgas Co., 238 Mich App 703; 607 NW2d 116, *leave denied*, 618 NW2d 591 (2000), Michigan Court of Appeals addressed the issue of legal duty post-Groncki. The Girvan court refused to impose a duty on the defendant gas supplier that required inspection and maintenance of the internal lines and appliances within the plaintiff's home. However, in discussing the issue before the court, the Girvan court recognized the general duty under the law which is imposed upon a utility company to inspect and maintain wires leading to a building citing Groncki and Schultz. Id, at 4. The Girvan court went on to note:

> "Michigan courts have traditionally imposed upon the suppliers of dangerous commodities the high standard of care in supplying those commodities -- a standard commensurate with the danger of the product."

Id, at 4.

What Michigan Courts have done since Groncki is limited Groncki to the factual scenarios giving rise to each cause of action presented in that case. One thing is for sure, imposition of a legal duty upon utilities is alive and well, even post-Groncki. In short, the Groncki plaintiffs Messrs. Groncki, Parcher and Bohnert were all sophisticated individuals whose own conduct led to inadvertent contact with the power lines which led to serious injury or death. In each case it was their own initial contact with the electrical lines which caused the injury. These factual scenarios are another point of departure regarding Groncki's applicability in this case.

Mr. Valcaniant is not asserting Edison owed a duty to warn of the presence of overhead power lines, or that Edison had a duty to move those power lines when the dumping activities of DeAngelis Landscape took place, or that Edison owed a duty to warn him of the obvious danger of contact with those lines. Mr. Valcaniant, likewise, is not arguing a duty was owed to him by Edison because somehow its lines were too low to the ground as asserted by Edison. Mr. Valcaniant's allegations of negligence/duty are much more basic, and certainly much more "foreseeable" than the issues raised by Edison in its Motion for Summary Disposition.

The lone issue to be examined in this case is simply: Was it foreseeable that injury to non-Edison, non-sophisticated individuals could occur from a re-energized, downed power line? The answer to this question, as correctly determined by the Trial Court, is "yes." It is improbable Edison could deny this basic proposition and we are all aware that Detroit Edison has warned adults, and children alike, about the hazards of downed power lines for generations.

The duty in this case does not emanate from the "arcing" of the electricity or the breaking of the overhead line as Edison asserts. The duty is imposed upon Edison for its treatment of the reasonably foreseeable circumstance of re-energizing a downed power line without first having determined the source or cause of the power interruption and determining whom or what would be at the receiving end of the additional charges.

Attached as **APPENDIX 5**, Exhibit F to plaintiff's brief below, is Plaintiff's expert, Donald W. Zipse, P.E.'s report. Mr. Zipse is a licensed engineer and electrical specialist who has set forth the duties owed by Detroit Edison to Steven Valcaniant, and the public at large, under the circumstances of this case and in connection with other cases of downed power lines. At page 4 of Mr. Zipse's expert report, (p. 94a of

the Appendix), particularly that section under Paragraph 7, entitled "Automatic recloser", Mr. Zipse related: "Before attempting to re-close the recloser after it remains open, a utility operator, is supposed to make sure the source of the fault has been removed." Additionally, at page 8 of Mr. Zipse's report, (p. 98a of the Appendix), he notes simply that Detroit Edison:

> "failed to install semi-insulated conductors in areas where people and/or trees are located or will be working and where overhead distribution lines are installed over or near businesses, such as car lots where auto hoisting applications could occur. Had Detroit Edison installed semi-insulated conductors across and adjacent to Mr. Steven Valcaniant's property, there is a very significant likelihood that he would not have sustained the harmful pain and disfigurement that resulted from the sequence multiple applications of electrical current that the automatic recloser applied to the downed line."

(See **APPENDIX 5**, pp. 94a, 98a; pp. 4, 8).

Whether a particular legal duty is breached is left for the trier of fact (See Case, *supra*). Here, the issue presented to this Court, by way of the Court of Appeals reversal of the Trial Courts Denial of Edison's Motion for Summary Disposition is simply that of duty. To recap, the issue is simply whether or not Edison owed a duty to end users for potential injury by re-charging downed power lines. To determine whether this duty exists, the courts have consistently looked at the issue of foreseeability. It is unequivocally foreseeable that downed power lines pose serious potential health risks to anyone who may be in the vicinity or come into contact with the current flowing therefrom. In short, Edison had a recognized duty to safeguard Mr. Valcaniant, **not from the first jolt caused by the downing of the power line, but from its having re-energized the downed power line without determining the source or cause of the line failure in the first place.** A

simple fuse placed properly in the line between the Valcaniant business and the main line running along the highway would have prevented this re-energized line from electrocuting Mr. Valcaniant. Likewise, a semi-insulated cable, inexpensive like the fuse, would have limited the amount of electricity flowing through the re-energized line to only the end point of that line, and would not have been able to throw off electricity from all areas along said line.

What we are ultimately left with is what the Trial Court correctly surmised in referring to Judge Cardozo's comments in Palsgraf v. Long Island Railroad Co., 248 NY 339; 162 NE 99, (1928), (**APPENDIX 15**). The Trial Court properly found:

> "The relation of proximate cause to duty . . . [is] the risk reasonably perceived defines the duty to be obeyed. It is the risk to another or to others within the range of apprehension.
>
> In the instant case, the conduct of which the Plaintiff complains of or the risk which Detroit Edison has taken is that when the circuit in one of its power lines becomes broken that circuit will re-energize four times before it is entirely shut off.
>
> The Court's understanding is that the purpose of the re-energizing a shorted power line is to allow the line to burn through trees or other minor impediments. Thus, in taking this expedient, the question becomes whether Detroit Edison could have reasonably perceived that a person who comes into contact with a downed wire would suffer increased harm from the line's re-energization.
>
> IN THIS COURT'S MIND THE ANSWER TO THAT QUESTION IS MOST ASSUREDLY YES." (Emphasis added).

APPENDIX 7, Trial Court decision on Motion to Dismiss, p. 143a, p. 23, lines 24-25; p. 144a, p. 24, lines 1 - 20.

Similarly in Case, Chief Justice Corrigan revealed the duty to adhere to Schultz by not overruling or distinguishing the result. Further, Justice Young (the author in Case) stated Justice Corrigan "was correct in noting that '[t]he scope of the duty should

vary with the nature of the risk." 463 Mich 1, at 8, n.10. This recent acknowledgment of this standard is quite similar to Judge Cardozo's edict provided many years ago. Edison, well aware of the scope of the risk involved in providing electricity, not only has a duty to manage this risk with reasonable care, but when it elects policies to manage this risk, it must properly choose and implement these policies non-negligently.

D. VOLUNTARY PERFORMANCE

Alternatively and argued by analogy, Edison's duty can be further secured using The State of Michigan's adherence to the voluntary assumption of a duty. Even if gratuitously, if a party elects to assume the performance of a duty, that party is then charged with exercising reasonable care in the performance of that duty.

In Sweet v. Ringwelski, 362 Mich 138; 106 NW2d 742 (1961), The Defendant truck driver was charged with a duty by negligently waving a 10-year old girl across the street. The Defendant in Sweet stopped at a crosswalk intersection and he gratuitously attempted to assist her cross the street. The Plaintiff's sightline of the far lane was impaired by the Defendant's truck. The vehicle in the far lane, which did not stop at the crosswalk, drove through the intersection and struck the Plaintiff.

This Court in Sweet decided to grant the Plaintiff's appeal and ordered a new trial. In doing so, Chief Justice Dethmers, speaking for a unanimous Court stated:

> "The law imposes an obligation upon every one who attempts to do anything, even gratuitously, for another, to exercise some degree of care and skill in the performance of what he has undertaken, for nonperformance of which duty an action lies. (Citing *Hart* v. *Ludwig*, 347 Mich 559, 564, 79 NW2d 895, 898, quoting from *38 Am.Jur., Negligence, sec. 17*, p. 659)."

362 Mich 138 at 143. (*See also*: Tucker v. Sandlin, 126 Mich App 701, 705, 337 NW2d 637 (1983)).

Further, Chief Justice Dethmers augmented this standard in stating:

> The good Samaritan incurs a responsibility avoided by those who "pass on the other side." One person seeing another in distress may or may not be under legal obligation to afford him relief, **but if he does undertake it he is bound to act with reasonable prudence and care, to the end that if his effort be unavailing it shall at least not operate to increase the injury which he seeks to alleviate.**" (Emphasis added).

362 Mich 138, at 143.

Mr. Valcaniant recognizes the duty in this situation presupposes a "special relationship" and directs this Court to the discussion in Groncki, (which cites Schultz), that acknowledges the "special relationship" that Edison has with the general public to protect it from the "inherently dangerous properties" of electricity.[5] Groncki at 655-6.

A legal duty exists upon all to act reasonably in light of the risk perceived; and the Sweet case affords an additional rationale to properly establish this duty upon the Defendant/Appellee Detroit Edison.

Edison can easily be viewed as in the Defendant truck driver's shoes in Sweet. Just as the truck driver voluntarily assumed a duty to facilitate the Plaintiff across the street, Edison has voluntarily assumed a duty to control the release of electricity from severed electrical lines. Further, just as the Defendant truck driver did negligently carry

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[5] In Groncki, Justice Brickley recognizes this relationship by stating: "In finding a duty . . . electrical companies occupy a special role as providers of an essential, yet extremely dangerous commodity. . . This special relationship with the public was found to impose a duty upon electrical companies to 'reasonably inspect and repair wires and other instrumentalities in order to discover and remedy hazards and defects'" Groncki at 655-6 (citing Schultz at 451).

out his assumed duty by waving the 10-year old Plaintiff across the street and she was subsequently harmed; Edison negligently carried out its assumed duty to control the release of electricity, (via their reclosure units), from a downed power line by re-energizing the circuit four times and subsequently re-electrocuting Mr. Valcaniant.

Edison, by negligently carrying out its assumed duty, has managed to increase the injury that it had sought to alleviate. Edison's voluntary policy of recharging faulted lines has put Mr. Valcaniant in a worse position than if Edison had decided to not act at all. No legal liability would have laid, for whatever harm may have occurred, if Edison chose not to follow this policy and not use the reclosures. Alternatively, if Edison had assumed this duty non-negligently, no additional electrocution would have occurred and Mr. Valcaniant's injuries would not have been as severe.

VII. CONCLUSION

A. EDISON'S CONDUCT

Detroit Edison in each instance claims it acted as a reasonable utility provider. These situations are, for most intents and purposes, undisputed and not the basis for imposing liability. This is the red herring provided by Edison in an attempt to misdirect this Honorable Court's attention from the actual issue(s) at bar and superfluous to this appeal. Mr. Valcaniant has no issue with Edison with respect to nearly every aspect of how Edison installed, maintained and serviced their wires on the day and at the site in question. Save one situation.

There exists one logical, foreseeable, reasonable and extremely dangerous situation that an electrical utility company must predominately concern itself with in

maintaining, operating and providing electricity to the public at large: That one situation is when the massive electrical power it harnesses and distributes to the public, manages to escape. Most specifically, one reasonably expected and re-occurring event comes to mind when a negligent or intentional release of this massive power occurs: That event would be when an electrical line becomes severed and in proximity to its customers.

Otherwise read, and as the Trial Court correctly interpreted: The duty here is defined by the risk which the Defendant could reasonable perceive. (**APPENDIX 7**, p. 144a, p.24). Detroit Edison in deciding how to address and manage this risk, elected to enact a voluntary policy to interrupt the flow of electricity upon sensing a fault. The next step in this policy, incredulous to read, is to then re-charge a powerless line four times and therefore re-electrocuting whatever or whoever could be at the other end of the faulted wire.

Edison, as they strenuously relate, in absence of any statutorily or judicially proscribed duty, voluntarily chose to de-energize their lines via a reclosure unit upon sensing a fault. A company in the position of Detroit Edison knowing an interruption in the flow of power occurred would seemingly do so. Amazingly, Detroit Edison would like this Honorable Court to believe and set precedent to the effect that a reasonable electrical company in the position of Detroit Edison would then re-charge the line (and thus here, re-electrocute Mr. Valcaniant) an additional four times in order to clear temporary faults. Edison's Court of Appeals Brief, p. 8 & footnote 1. The end result of

Detroit Edison voluntarily setting this procedure and negligently foreseeing its deadly consequences is what has brought these facts before this Court.

B. STEVEN J. VALCANIANT'S CONDUCT

Again, for most intents and purposes, the analysis of Mr. Valcaniant's conduct and actions (and also Mr. Stander's), is irrelevant for purposes of this appeal. Its existence in the Edison Brief (Defendant/Appellee's Court of Appeals Brief, p.5) is provided to supplement its subjective view of this case. It is part and parcel of the juxtaposition and manipulation of the facts and/or law to persuade its reader that their position is correct. To strongly reiterate: **MR. VALCANIANT DID NOT PLEAD ISSUES AND/OR ARGUMENTS THAT THE DEFENDANT/APPELLEE'S BRIEF HAS ADDRESSED**. The Trial Court correctly recognized this in dismissing its original two motions and surely this learned and experienced Court will too recognize this and deny Edison's claim for relief.

Edison, through its original Motion for Summary Disposition, its Motion for Rehearing/Reconsideration and Leave to File an Interlocutory Appeal continually attempts to frame these facts and legal issues to fit its subjective view of the incident in question.

Edison's premises have been examined and rejected twice. In denying their first two motions, the Trial Court ruled that this case is not what Edison claims it is. It ruled that the cases that led to, and the Groncki decisions themselves, are distinguishable from the facts at bar and therefore inapplicable for resolution of this case (See

generally, **APPENDIX 7** and **APPENDIX 10**). Given this ruled upon and legally significant difference, the Trial Court correctly held that the Defendant/Appellant's duty was then proscribed by the risk that could reasonably be perceived. The risk, which no doubt could and is reasonably perceived by Edison, is the very hazardous event when live electrical lines fall, regardless of the reason why.

Understanding that electrical lines have, do, and will continue to fall, the legal duty was correctly levied upon Edison by the lower Court in how they address and manage this perceived and established risk. The lower Court correctly ruled that Edison, by choosing to assume this duty and negligently manage this risk by ultimately re-charging their lines, are now vulnerable to review of their negligent acts by a trier of fact. The Trial Court correctly held that "the Defendant could have reasonably foreseen that [if] a person came in proximity [upon a] downed power line [they] would suffer increased harm because of its re-energization." (See **APPENDIX 10**, p. 177a, p. 7, lines 17 - 20).

VII. SUMMARY AND RELIEF

Plaintiff/Appellant, MR. STEVEN J. VALCANIANT respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals unpublished opinion dated February 19, 2002 and remand these matters to said court for a full and thorough review and analysis of the proper issue as determined by the Trial Court below and represented in his brief.

In the alternative, the Plaintiff/Appellant respectfully requests that this Honorable Court grant leave for his appeal and decide these matters on their merits and hold that Groncki is a plurality opinion and therefore cannot be used under the rule of *stare decisis* to decide the facts of his case.

Further, he respectfully requests that this Honorable Court reinstate the findings of the Trial Court below UPHOLD the March 17, 2000 and May 8, 2000 Orders Denying Defendant/Appellee's Motion for Summary Disposition and Denying Defendant/Appellee's Motion for Rehearing of the Trial Court's denial of Defendant's Motion of Summary Disposition.

Respectfully submitted,

KOHL, HARRIS, NOLAN & McCARTHY P.C.

By: Malcolm A. Harris (P14681)
Michael J. Nolan (P42240)
William M. Ogden (P58692)
Attorneys for the Plaintiff/Appellant
3782 South Lapeer, Ste. 200, P.O. Box 70
Metamora, Michigan 48455-0070
(810) 678-3645

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